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## Antitrust Immunity and Standard Setting Organizations: A Case Study in the Public-Private Distinction

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# ANTITRUST IMMUNITY AND STANDARD SETTING ORGANIZATIONS: A CASE STUDY IN THE PUBLIC-PRIVATE DISTINCTION

Christopher L. Sagers\*

## INTRODUCTION

Despite the availability of conceptual alternatives, no less a body than the United States Supreme Court finds it “essential”<sup>1</sup> that in the regulation of business we recognize “public” and “private” entities as distinct and make important legal consequences depend on the difference.<sup>2</sup> The idea, ubiquitous in mainstream liberalism but long

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\* Assistant Professor of Law, Cleveland State University. My special thanks for feedback to Aaron Edlin, Al Klevorick and Ken Katkin, who commented on the paper during conference presentations. My thanks also for fruitful and provocative feedback from the participants in the Stanford/Yale Junior Faculty Forum, the Ohio Legal Scholarship Forum, and the faculties of law at Seattle University, the University of Utah, and my colleagues at Cleveland State. For their comments on earlier drafts I wish to thank Ed Eliasberg of the Department of Justice, Jeff Oliver and Ted Cruz of the Federal Trade Commission, and Professors Peter Hammer, Mike Jacobs, Thomas Morgan and Jonathan Rose. The views expressed are my own.

<sup>1</sup> *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165 (1978) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974)).

<sup>2</sup> The distinction as we know it in Western thought appears to owe its oldest origins to the rise of genuine nation-states and the newly conceived concern they posed vis-a-vis the individual, particularly as expressed in the nascent liberalism of John Locke and Thomas Hobbes. See Morton J. Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1423 (1982) [hereinafter Horowitz, *Public/Private*]; cf. JAMES WILLARD HURST, *LAW AND MARKETS IN UNITED STATES HISTORY* 22-23 (1982); Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Bros. v. Brooks*, 130 U. PA. L. REV. 1296, 1296-97 (1982).

In its classical form, the distinction reflected a perceived difference between human individuals and the “state.” In its modern form, the distinction seems to be mainly an economic one. The “private” are those bodies that operate within and are regulated by markets, while the “public” are those that operate within and are constrained by political exchange. See Brest, *supra*, at 1296-97; cf. CHARLES LINDBLOM, *POLITICS AND MARKETS: THE WORLD’S POLITICAL ECONOMIC SYSTEMS* (1977); Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Reputation*, 130 U. PA. L. REV. 1429, 1429 (1982). The modern understanding—under which we no longer imagine “private” to refer only to the human individual—reflects both (1) the explosion of multi-member, multi-investor businesses organized to exploit the scale economies made possible by advancing manufacturing technology, which as early as 1820 had brought about the need to distinguish explicitly between “public” and “private” corporations, see *The Dartmouth College Case*, 17 U.S. (4 Wheat.) 518, 666 (1819) (Story, J., concurring); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, 111-14 (1977) [hereinafter HORWITZ, *THE TRANSFORMATION*], and (2) the rapidly developing

unpopular with academics, has suffered at least a century of criticism,<sup>3</sup> and it is now faulted particularly for its Procrustean application of one or the other label to those many modern entities that seem to fall in between.<sup>4</sup> Moreover, though courts often imply that no alternative could inform the treatment of business while preserving other values of American democracy—that is, that there is no choice<sup>5</sup>—in fact they have chosen among alternative approaches and the choice itself poses substantive consequences.

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conviction in nineteenth century liberalism of the self-regulatory power of private markets, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 206-07 (1992); KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIMES* (2d ed. 2001). This transformed understanding of “private” also might reflect something uniquely American about 18th and 19th century political thought in this country. See HURST, *supra*, at 19-20. In any event, as Professor Horwitz observes, “only the nineteenth century produced a fundamental conceptual and architectural division in the way we understand the law. One of the central goals [of that time] was to create a clear separation between . . . public law—and the law of private transactions . . .” Horwitz, *Public/Private*, *supra*, at 1424.

The problem at the heart of this paper—the promulgation by assertedly “private” entities of codes or standards that come to have the de facto or even de jure force of law—arguably began in the late 19th century, following the first furious controversies over actions of the “state” under the new Fourteenth Amendment. By that time the public-private distinction was, in the minds of the American judiciary, ubiquitous and iron-clad. See HORWITZ, *THE TRANSFORMATION*, *supra*, at 111-14; see also *infra* Part. I.

<sup>3</sup> Criticism of the distinction came fully to the fore in American thought most visibly in the Legal Realism movement in the early 20th century, see Horwitz, *Public/Private*, *supra* note 2, at 1423 n. 14 (collecting criticism from 1909 to 1935); *infra* note 35 and accompanying text, though perhaps socialist critique could also be explained in this light, and thus the criticism might extend back at least another fifty years or so, GEORG LUKÁCS, *HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS* 83-222 (R. Livingston trans., Merlin Books 1971) (1923).

There seems to be broad agreement that the distinction is at least difficult and perhaps useless in judicial application, see, e.g., Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 668, 681-82 (1991) [hereinafter Elhauge, *Scope*], and even those who see some value in it concede the exceptional difficulty posed by actually using it in theory or practice. See, e.g., Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1444-48 (1980).

However, most criticism of the distinction does not concern the difficulty of application in practice, but rather is based on substantive political commitments. Namely, “[p]rivate power began to become increasingly indistinguishable from public power,” or so it seemed to those on the left, Horwitz, *Public/Private*, *supra* note 2, at 1428, and the connotations of “private” became more and more difficult to square with the real-world nature of huge and influential entities that we still formally describe with that word. It seemed clear, especially on the left, that the old distinction had grown inadequate to capture the true predicament of most individuals in relation to other entities. See *id.*; Morton J. Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1829 (1987); cf. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (1942). This point, obviously enough, remained central to leftward legal critique at least through the 1980s. See MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 102-09, 198 (1987); Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 L. & SOC. INQUIRY 779, 798 (1992). See generally NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995).

<sup>4</sup> For a particularly interesting discussion of the issue in an interesting context, and for a good summary of the problem of liberalism generally, see Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1074-76 (1980).

<sup>5</sup> See *infra* note 117 and accompanying text.

This Article is in effect a case study. It considers one particular circumstance in which the distinction between “public” and “private” has caused serious, real-world consequences, and suggests a rectification by reconceiving the problem without reference to either term. An important insight of the study is the very simplicity of the doctrinal alternative that presented itself, which seems contrary to the common view that no permissible alternatives exist at all.<sup>6</sup> Another important insight is that the suggested doctrinal proposal tends to elicit vigorous protest. What is significant about this is that the counter-arguments themselves seem to be driven by the same instincts that underlie the public-private distinction. Perhaps the most important piece of the entire Article is its discussion and response to counter-arguments; understanding them seems important and if it can be shown that they are not as significant as they seem, then that should cast further doubt on the distinction itself.<sup>7</sup>

The doctrinal problem in the case study is this: uncertainty persists in antitrust law as it applies to a large class of organizations that issue model standards or model codes for government consumption (hereinafter “standard setting organizations” or “SSOs”). The so-called *Noerr-Pennington* or “petitioning” immunity,<sup>8</sup> an antitrust rule that protects persons from being sued in antitrust when they petition the government, has been held to immunize these SSOs in cases in which they have created their standards for adoption as law. The idea is that in such a case the SSO is simply a private entity petitioning its government, asking that a particular model code it has drafted be made law.<sup>9</sup>

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<sup>6</sup> Indeed, to reach the conclusion I explain herein I will be required to distinguish only one Supreme Court opinion, see *infra* notes 111-20 and accompanying text (distinguishing inapt language in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988)), and I need genuinely criticize none. Moreover, I think the repackaged doctrinal approach I suggest will be easy to apply, or at least no less so than the Court’s current immunity standards.

<sup>7</sup> Being a law review article, and focusing as it does on a fairly narrow issue of doctrine, the discussion in this case study will probably sometimes seem more adversarial or rhetorical than is appropriate to a “case study.” Let me stress, however, that this is not fundamentally a work of doctrinal argument, but a use of one doctrinal problem and what various voices have said about it, and I have endeavored to keep the discussion even-handed and objective.

While I make no real pretension to rigorous social science, the larger goal of the Article is not to argue for a particular doctrinal position, and I believe it can succeed in its purpose even if the doctrinal position suggested is not free from problems.

<sup>8</sup> The name “*Noerr-Pennington*” comes from *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). As Einer Elhauge has explained, the name may no longer do the doctrine justice because it has been significantly altered by later cases, most importantly *Allied Tube*, 486 U.S. at 492, 500. Therefore, I will follow Professor Elhauge’s example and refer to the doctrine as the “petitioning immunity doctrine,” the “antitrust immunity,” or the like. See Einer Elhauge, *Making Sense of the Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177, 1194 (1992) [hereinafter Elhauge, *Making Sense*].

<sup>9</sup> See Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n, 107 F.3d 1026 (3d Cir. 1997)

This view has an intuitive appeal—since, after all, we are all free to ask our government for legislation that we favor. However, it may also be a very significant mistake, and as a formalistic enterprise it frequently seems to obscure a great deal of factual detail surrounding the relationship between powerful SSOs and their government patrons. This view also obscures the negative consequences of a caselaw rule under which, in the right circumstances, powerful groups can virtually regulate their own markets without constraints either from the democratic process or judicial review. The situation is all the more problematic because it is so obscure—few average Americans are aware that SSOs even *exist*, much less that they are basically ubiquitous and have acquired power to regulate in areas that affect multiple, broad ranging aspects of our everyday lives.

The problem of powerful SSOs is an opportune case study because it shows how far the harms of the traditional public-private distinction go beyond mere doctrinal confusion. To be sure, it has caused confusion. Resolution of the SSO problem could have been solved by a straightforward application of another rule in antitrust law called *Midcal* immunity,<sup>10</sup> but this approach is significantly complicated by the courts' instinct that "private" persons can never be liable for

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(holding ABA immune for law school accreditation activities); *Sessions Tank Liners, Inc. v. Joor Mfg. Co.*, 17 F.3d 295 (9th Cir. 1994) (immunizing deliberate misrepresentations to an SSO as valid attempts to influence government action); *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378 (7th Cir. 1992) (holding ABA immune for promulgation of model ethical rules); *Sherman Coll. of Straight Chiropractic v. Am. Chiropractic Ass'n*, 813 F.2d 349 (11th Cir. 1987) (holding chiropractic trade association immune for school accreditation activities); *Zavaletta v. Am. Bar Ass'n*, 721 F. Supp. 96 (E.D. Va. 1989) (holding ABA immune); *cf. Sanjuan v. Am. Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 250 (7th Cir. 1994) (holding that while psychiatric certification board's decisions were the basis of granting certain state benefits, board was not a "state actor").

<sup>10</sup> The rule takes its name from *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), but cases predating *Midcal* had applied essentially the same analysis. See *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978); *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 362 (1977); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 790 (1975). Indeed, the rule could really be called the *Bates* rule, for there the Court wrote that the challenged constraints—the Arizona Supreme Court's restrictions on lawyer advertising—"reflect[ed] a clear articulation of the State's policy with regard to professional behavior" and were "subject to pointed re-examination by the policy maker—the Arizona Supreme Court—in enforcement proceedings." *Bates*, 433 U.S. at 362.

The *Midcal* opinion, however, was the first to synthesize the prior decisions and clarify the rule as having two components, and is the case normally cited for the two-prong test. See, e.g., *FTC v. Tior Title Ins. Co.*, 504 U.S. 621, 633 (1992) (so identifying the *Midcal* opinion); 1 PHILIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 217b (2003) (same); 2 *SECTION OF ANTITRUST LAW, AM. BAR ASS'N, ANTITRUST LAW DEVELOPMENTS (FOURTH)* 1075 (1997) [hereinafter *ANTITRUST LAW DEVELOPMENTS*] ("*Midcal's* two-pronged test has supplied the essential analytical framework within which subsequent decisions have determined the availability of immunity to private parties.").

harms “caused” by “public” entities.<sup>11</sup> Each of those terms is problematic and laden with policy and philosophical issues. Furthermore, the traditional approach rests on a notion—government action as the “cause” of something—that is easy to abuse and is neither related to the substantive purposes of antitrust nor required by the First Amendment.<sup>12</sup>

But in addition to the mere doctrinal confusion the public-private distinction has caused, the case study explores how it disguises potentially dramatic substantive effects. In the case of influential SSOs, it appears to have masked a donation of a large amount of the public’s power into private and self-interested hands, arguably in derogation of the very individual liberties the antitrust immunities were meant to preserve. The problem therefore invites a metaphysical shift of the gears—a revisitation of the strong but problematic instinct that SSOs are just private supplicants of government.

The Article therefore has two larger goals, above and beyond discussion of the doctrinal problem itself. First, it seeks to show that the public-private distinction causes doctrinal confusion, and that legal problems can be solved without reference to the distinction by means that are both manageable and consistent with prevailing political values. Indeed, the alternative that presents itself in this instance is not only simple, but only controversial in that it ignores the public-private distinction. Second, and more significantly, the Article seeks to explain that the distinction causes problems worse than doctrinal confusion.

The Article proceeds in four Parts. Parts I and II describe the historical and legal background of SSOs, the conceptual problem they have posed for courts and litigants, and the caselaw on point as it currently exists. Part III then describes the proposed doctrinal alternative, and in particular explains both its counterintuitive simplicity and the weaknesses of the various arguments that criticize its failure to respect “privacy.” This is the important part, again, because addressing the counter-arguments to this proposal gets to the basis of the public-private distinction itself.<sup>13</sup> Finally, Part IV provides a brief concluding

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<sup>11</sup> See *infra* note 35 and accompanying text.

<sup>12</sup> See *infra* notes 68–74 and accompanying text.

<sup>13</sup> At this point it seems important to make a normative confession, and though it will play a relatively muted role in the article, it is actually quite important to the overall argument. For rhetorical reasons, I want the normative piece of the article to be as uncontroversial as possible. This is so because a chief purpose of the article is to show that not only might it be good to do away with the public-private distinction, but that it might just be *easy* to live without it. To that end, it is my contention that the argument I make in this article can be made on only one simple, uncontroversial normative claim, and it is this: If: (1) it is good that government agencies are subject to judicial review, and (2) some private entities are both as powerful as government agencies and perform the same functions as government agencies, then (3) to shield those entities from all liability, *ceteris paribus*, must be bad. In other words, I will assume that judicial review of government agencies is good. If you can live with that, then there should be no real problems

summary.

# I. THE PROBLEM WITH STANDARD SETTING ORGANIZATIONS

The production of non-governmental standards as we now know them began tentatively enough in this country in the late nineteenth century. During the twentieth, they grew to a degree of profusion that is hard to exaggerate. Together, the thousands of SSOs currently active in the U.S. produce many tens of thousands of model codes and standards,<sup>14</sup> many of which are routinely adopted more or less verbatim into federal, state and local law.<sup>15</sup> Indeed, the federal government not long ago decided that business people are so much better at devising

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of normativity. This maneuver also saves me from tedious philosophical problems I don't care to deal with right now. Cf. Christopher L. Sagers, *Waiting With Brother Thomas*, 46 UCLA L. REV. 461 (1998) (dealing with them); Christopher L. Sagers, Cum Grano Salis (Nov. 19, 2002) (unpublished manuscript, on file with *Cardozo Law Review*) (doing the same).

<sup>14</sup> There is no reliable current estimate of the number of U.S. SSOs or the number of their standards, and there is probably no way of maintaining a current estimate. Following the advent of the contemporary high technology economy, and the advantages in high tech industries for private standardization, the creation, life, and death of new SSOs has accelerated to a tremendous pace. Cf. Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1896-98 (2002) (explaining the nature and current circumstances of SSOs in high-tech industries).

In any case, the numbers are surely staggering. Even prior to the explosion of the high tech economy, one estimate of the late 1980s found as many as 400 private SSOs in the United States, producing as many as 30,000 standards. See MAUREEN A. BREITENBERG, NATIONAL INSTITUTE OF STANDARDS & TECHNOLOGY, *THE ABC'S OF STANDARDS-RELATED ACTIVITIES IN THE UNITED STATES I* (1987). One other study found that as many as 100,000 people were involved in standard setting activity. See Joseph Farrell & Garth Saloner, *Coordination Through Committees and Markets*, 19 RAND J. ECON. 235, 235 (1988).

<sup>15</sup> These rubber-stamp provisions—in which a standard is more or less incorporated by reference or adopted verbatim—take a variety of forms, but the effect is usually the same: the state or local government's own legislative authority is in one way or another given away to a private group.

Alaska, for example, has adopted a statute concerning the safety of boilers and pressure vessels. For an illustration of why a boiler code might be an important political problem, take a look at the facts in *American Society of Mech. Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982). But what is really interesting is the manner in which Alaska adopted this code. Under the statute the state labor department may “adopt the existing public codification” promulgated by the ASME and “shall adopt amendments and interpretations to the code *immediately upon their adoption* by the [ASME] so that the definitions and regulations at all times follow generally accepted nationwide engineering standards.” ALASKA STAT. § 18.60.180 (2003) (emphasis added). In other words, the substantive law of the state of Alaska on this point is the law set *both now and in the future* by the ASME.

For just a few of the many, many similar examples in which a state has incorporated by reference the code of a private group, see ALA. CODE § 24-4A-4(b) (1981); ARK. CODE ANN. § 20-22-603 (2003); CAL. FOOD & AGRIC. CODE § 17152 (2004); CAL. LAB. CODE § 7681(b) (2004); COLO. REV. STAT. § 8-20-411(1) (2003); FLA. STAT. § 554.103(1) (2003); GA. CODE ANN. § 34-11-4(a)(2) (2002); ME. REV. STAT. ANN. tit. 12, § 7851(5) (2003). Sometimes states go so far as to use the phrase “adopted by reference.” See, e.g., WASH. REV. CODE § 19.27.031 (2003).

rules than the government is that it has directly adopted *thousands* of private standards for use both in its procurement (which seems comparatively innocuous) and in regulation (which does not).<sup>16</sup> Even Supreme Court Justices think we can no longer live without private standards.<sup>17</sup>

Though many SSOs are eminent, well established, highly-regarded, and often appear quite sincerely public-minded, they are also often significantly comprised of private trade competitors,<sup>18</sup> who, not surprisingly, have sometimes abused the system for economic advantage.<sup>19</sup> Indeed, recognizing the potential for abuse, the Federal Trade Commission once tried to regulate this practice of standard-setting, but apparently succumbed to costly litigation brought by certain powerful SSOs<sup>20</sup> and abuse from a hostile legislature.<sup>21</sup> No FTC rules

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<sup>16</sup> Namely, the Office of Management and Budget, under guidance set forth in the National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113, 110 Stat. 775 (1996), has required executive branch agencies to use any "voluntary consensus" standard that exists and is relevant to a particular procurement or regulatory activity, unless to do so would be "inconsistent with law or otherwise impractical." OMB Circular No. A-119; Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 Fed. Reg. 8,546, 8,554 (Feb. 19, 1998).

<sup>17</sup> See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 514 (1988) (White, J., dissenting) ("State and local governance necessarily . . . turn to these proposed codes in the process of legislating . . . . There is no doubt that the work of these private organizations contributes enormously to the public interest . . .").

<sup>18</sup> For example, the American National Standards Institute ("ANSI"), one of the world's most influential SSOs, is comprised in part of academics and government institutions, but also of a large number of private businesses. See ANSI, Company Members, at [http://web.ansi.org/membership/membership\\_rosters/db\\_list.aspx?menuid=2public/about.html](http://web.ansi.org/membership/membership_rosters/db_list.aspx?menuid=2public/about.html) (last visited Feb. 9, 2004). Other examples of groups with significant private membership include the American Bar Association ("ABA"), the American Institute of Certified Public Accountants ("AICPA"), the American Institute of Architects ("AIA"), the Joint Commission on Accreditation of Health Organizations ("JCAHO"), the National Committee for Quality Assurance ("NCQA"), the National Fire Protection Association ("NFPA") and the American Society of Mechanical Engineers ("ASME").

<sup>19</sup> As the Supreme Court put it, "[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by [them] have a serious potential for anticompetitive harm." *Allied Tube*, 486 U.S. at 500.

For a sampling of the case law holding that trade associations can be liable for harms arising out of standard setting, see *infra* notes 49-50. Indeed, both the ASME and a member of the NFPA have been found liable for antitrust violations before the Supreme Court of the United States. See *Allied Tube*, 486 U.S. 492; *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

<sup>20</sup> See *Am. Nat'l Standards Inst. v. Fed. Trade Comm'n*, No. 79-1275, 1982 U.S. Dist. LEXIS 10832 (D. D.C. Feb. 4, 1982).

<sup>21</sup> Congress attacked the proposed FTC rules with uncommonly surgical precision in the Federal Trade Commission Improvements Act of 1980, Pub. L. 96-252, 94 Stat. 374 (May 28, 1980), which, among other things amended a main FTC rulemaking provision to provide that "the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section." *Id.* That provision remains law. See 15 U.S.C. § 57a(a)(1)(B) (2003). See generally Christopher L. Sagers, *The Legal Structure of American Freedom and the Provenance of the Antitrust Immunities*, 2002 UTAH L. REV. 927.



were ever adopted.

A key feature of the SSO landscape is the age and extent of the relationships between many SSOs and their government clients, relationships that both parties often cultivate. For example, the American Bar Association ("ABA"), has come to have what could only reasonably be called regulatory power over law schools by virtue of its role as their accreditor. However, that power does not flow from the inherent value that law schools place in having the ABA's approval. Presumably, without the backing of government authority, law schools would not care nearly so much about the ABA's opinion. Rather, the power exists because of state law requirements that applicants for the routine bar exam graduate from an ABA accredited law school.<sup>22</sup> Moreover, that the ABA has, in effect, been granted de facto state power in this manner is neither a coincidence nor a recent development. It reflects nearly a century of the ABA's hard fought effort to forge close ties with the state governments, an effort that appears to have been calculated and driven by self-interest.<sup>23</sup>

Likewise, the Joint Commission on Accreditation of Health Organizations ("JCAHO") is composed entirely of non-governmental representatives of private industry and professional associations, and yet it exercises enormous power over the healthcare industry as the accreditor who determines which healthcare providers may treat Medicaid recipients, and thereby receive Medicaid funds.<sup>24</sup> JCAHO derives this power by explicit directive of the Medicare Act.<sup>25</sup> Again, this approach to healthcare quality regulation was in part driven by the need to secure the political support of the medical community for passage of Medicare.<sup>26</sup> In other words, what was very literally a delegation of government regulatory power to a private entity was the result of a compromise that suited the two sides' mutual need to retain power.

Accordingly, groups like these sometimes seem hardly distinct from government agencies at all, except for the fact that they are organized "privately" rather than "publicly." The courts, however, have by and large rendered them immune from legal review, always on the theory that they are merely private entities and any harm they "cause" is

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<sup>22</sup> George B. Shepard & William G. Shepard, *Scholarly Restraint? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2122 & n.76 (1998).

<sup>23</sup> See *id.*; see also Marina Lao, *Discrediting Accreditation? Antitrust and Legal Education*, 79 WASH. U. L. Q. 1035 (2001).

<sup>24</sup> See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 617-18 & nn.296-306 (2000); Eleanor D. Kinney, *Private Accreditation as a Substitute for Direct Government Regulation in Public Health Insurance Programs: When Is It Appropriate?*, 57 L. & CONTEMP. PROBS. 47 (1994).

<sup>25</sup> See 42 U.S.C. § 1395bb (2003); Freeman, *supra* note 24, at 611.

<sup>26</sup> See Freeman, *supra* note 24, at 611.

in fact caused by independent government action.<sup>27</sup> There is a growing risk, incidentally, that this result will in effect be constitutionalized, because there is also confusion as to whether the petitioning immunity is itself a rule of First Amendment Law.<sup>28</sup> If so (a result that would seem preposterous except that several United States Courts of Appeals have adopted it),<sup>29</sup> then SSOs would enjoy not only antitrust immunity, but a nearly iron-clad immunity from essentially any other judicial review and perhaps any government regulation whatsoever.<sup>30</sup>

Standards and SSOs are not new to legal scholarship—a voluminous body of inquiry has arisen in the past fifteen years or so concerning the standardization of products and services. That work, however, has mostly focused on design standards in high technology industries<sup>31</sup> and on the special economic and legal questions they raise,<sup>32</sup> although there has also been the occasional piece on miscellaneous doctrinal issues related to SSOs.<sup>33</sup> Likewise, the past two decades have seen a genuine renaissance of concern for “privatization”

<sup>27</sup> See *infra* notes 84-85, 87, 91-94 and accompanying text.

<sup>28</sup> See generally Sagers, *supra* note 21.

<sup>29</sup> See *id.* at 930 & n.6.

<sup>30</sup> See *id.* This is so because, on the one hand, the petitioning immunity is absolute—when it applies, it bars any action whatsoever. It is therefore much more difficult to penetrate than the protection normally provided by the First Amendment. First Amendment rules, on the other hand, are very broad—where the First Amendment protects particular activity, it provides some protection from *all* legal interference. Thus, if the antitrust immunity were in fact a First Amendment doctrine, then it would apply a highly rigid immunity—in fact, an absolute immunity—as against *any* cause of action or regulatory constraint. See *id.*

<sup>31</sup> See, e.g., Jack E. Brown, *Technology Joint Ventures to Set Standards or Define Interfaces*, 61 ANTITRUST L.J. 921, 922-23 (1993); Farrell & Saloner, *supra* note 14; Michael L. Katz & Carl Shapiro, *Network Externalities & Compatibility*, 75 AM. ECON. REV. 424, 424-40 (1985); Douglas D. Leeds, *Raising the Standard: Antitrust Scrutiny of Standard Setting Consortia in High Technology Industries*, 7 FORDHAM I.P., MEDIA & ENT. L.J. 641, 643-46 (1997); Lemley, *supra* note 14; Stan J. Liebowitz & Stephen E. Margolis, *Are Network Externalities a New Source of Market Failure?*, 17 RES. L. & ECON. 1, 3 (1995); Mark R. Patterson, *Antitrust and the Costs of Standard-Setting*, 87 MINN. L. REV. 1995 (2003); David J. Teece & Edward F. Sherry, *Standard Setting and Antitrust*, 87 MINN. L. REV. 1913 (2003); Patrick D. Curran, Comment, *Standard-Setting Organizations: Patents, Price-Fixing, and Per Se Legality*, 70 U. CHI. L. REV. 983 (2003).

<sup>32</sup> I should note here that this article is not concerned with so-called “network externalities” as they relate to SSOs, or with any other substantive traits of standards themselves. Given the significance of electronic products in the economy of the past several years, antitrust debate has been chock full of talk about this phenomenon and how it relates to standard-setting activity. See sources cited *supra* note 31. For an especially interesting discussion, see Paul David, *Clio and the Economics of QWERTY*, 75 AEA PAPERS & PROC. 332, 334-46 (1985). This paper has nothing to say on such subjects, though it is worth noting that if an SSO becomes entwined with the government in the way I describe herein, I think it should be subject to antitrust challenge regardless why that relationship develops. Network effects, like other welfare concerns, go only to the merits, not to the preliminary issue of immunity.

<sup>33</sup> See, e.g., Katie M. Colendich, Comment, *Who Owns the Law? The Effect on Copyrights When Privately-Authorized Works Are Adopted or Enacted by Reference Into Law*, 78 WASH. L. REV. 589 (2003).

of traditionally government functions,<sup>34</sup> a subject that had been of little interest to legal academics for fifty years or more.<sup>35</sup> However, most of this work seems to have focused on delegation of implementation functions—that is, the contracting out of the provision of goods and services under programs otherwise still in the hands of traditional government.<sup>36</sup> Those few authors who address actual policymaking by SSOs often seem to see it as something of a minor sidelight.<sup>37</sup>

## II. LEGAL BACKGROUND

### A. *The Nature of “Standards”*

“Standard”, for present purposes, means a normative rule or opinion issued by a group qua group and intended to change or regulate some area of human endeavor. This is plainly not the only possible definition,<sup>38</sup> and theoretical consideration of the idea seems potentially

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<sup>34</sup> See, e.g., *THE PROVINCE OF ADMINISTRATIVE LAW* (Michael Taggart ed., 1997); Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and their Constitutionality*, 16 *HASTINGS CONST. L.Q.* 165 (1989); Jody Freeman, *The Private Role in Public Governance*, 75 *N.Y.U. L. REV.* 543, 545 (2000); Gillian K. Hadfield, *Privatizing Commercial Law: Lessons from ICANN*, 6 *J. SMALL & EMERG. BUS. L.* 257 (2002); Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 *N.Y.U. L. REV.* 144, 148-49 (2003); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 *N.W. U. L. REV.* 62 (1990); Gillian E. Metzger, *Privatization as Delegation*, 103 *COLUM. L. REV.* 1367 (2003). The subject of “privatization” was also the subject of a recent law review symposium. See Symposium, *Privatization: The Global Scale-Back of Government Involvement in National Economics*, 48 *ADMIN. L. REV.* 435 (1996).

<sup>35</sup> As one small part of what was a much larger Realist attack on the traditional conception of “private” interests underlying property and freedom of contract, see, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 *CORNELL L.Q.* 8 (1927), the problem of “private” policy making entities was considered in an article by Louis Jaffe of what is now the SUNY Buffalo Law School. See Louis L. Jaffe, *Law Making By Private Groups*, 51 *HARV. L. REV.* 201 (1937). Professor Jaffe’s article, which is coming again to light, appears to have been the first and only such article specifically on this topic until the late 1980s. It is surprising that “private” regulating drew as little interest as it did from the Realists, theirs being a period in which the National Industrial Recovery Act, the Federal Trade Commission and the Commerce Department of then-Secretary Hoover had all encouraged “codes of fair competition,” and the crushing exigencies of the Depression had put socialist or other collectivized economic alternatives in the minds of many. See generally JOHN D. CLARK, *THE FEDERAL TRUST POLICY* (1929); ROBERT HIMMELBERG, *THE ORIGINS OF THE NATIONAL RECOVERY ADMINISTRATION* (1993); RUDOLPH J. R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888-1992* (1996). In any case, scholarly concern for privatization of policymaking seems largely to have disappeared until about fifteen years ago.

<sup>36</sup> See, e.g., Freeman, *supra* note 24; Metzger, *supra* note 34.

<sup>37</sup> See, e.g., David V. Snyder, *Private Lawmaking*, 64 *OHIO ST. L.J.* 371, 376 & n. 9 (2003).

<sup>38</sup> Several others have been suggested. See, e.g., OMB Circular No. A-119; Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 *Fed. Reg.* 8,546, 8,554 (Feb. 19, 1998) (defining “standard” as a “[c]ommon and repeated use of rules, conditions, guidelines or characteristics for products or related processes and production methods, and related management systems practices” or a

very interesting and important. But for present purposes it is really only important to cast the definitional net widely, because the range of conduct that raises the concerns discussed here is very broad. It includes formulation of codes that resemble the work of legislatures,<sup>39</sup> but it could also include statements of authoritative opinion,<sup>40</sup> “rules” which seem more like professional ethical rules or union “work rules,”<sup>41</sup> and adjudicative activity.<sup>42</sup> Such a broad definition, however, suggests that at least some “standards” enjoy First Amendment protection, though the degree of the protection probably depends more on the nature of the organization than on the nature of its standard.<sup>43</sup> Also, it is

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“definition of terms; classification of components; delineation of procedures; specification of dimensions, materials, performance, designs, or operations; measurement of quality and quantity in describing materials, processes, products, systems, services, or practices; test methods and sampling procedures; or descriptions of fit and measurements of size or strength.”); DAVID HEMENWAY, *INDUSTRYWIDE VOLUNTARY PRODUCT STANDARDS* 8 (1975) (a standard is “something taken for a basis of comparison, or that which is accepted for current use through authority, custom or general consent”); Lemley, *supra* note 14, at 1896 (a standard is “any set of technical specifications that either provides or is intended to provide a common design for a product or process.”); Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 *FORDHAM L. REV.* 1125, 1126 (2002) (“[T]he word ‘standard’ refers to the specific contours of the identical exemplars in the class, the template into which all exemplars fit or by means of which they can be accurately described.”); cf. Harry S. Gerla, *Federal Antitrust Law and Trade and Professional Association Standards and Certification*, 19 *DAYTON L. REV.* 471, 472-74 (1994) (noting that “no exact definition exists for the term ‘standard.’”).

<sup>39</sup> See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (considering the National Electric Code, a comprehensive and detailed private code governing electrical safety); see also sources cited *supra* note 16.

<sup>40</sup> Cf. *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989) (holding that press release disfavoring radial keratotomy was a position statement, not a restraint of trade); see also *infra* note 49 (discussing the unique problems presented by *Schachar*).

<sup>41</sup> See, e.g., *Cal. Dental Ass’n v. FTC*, 526 U.S. 756 (1999) (considering ethical rules of voluntary professional association limiting some forms of advertising); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447 (1986) (holding illegal a “work rule” issued by a self-styled “union” of dentists that no member shall release certain patient information to dental insurers); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975) (holding illegal ethics rules advisory opinions issued by local bar associations).

<sup>42</sup> ABA accreditation, for example, superficially resembles an adjudicatory function, but is in fact an application of the ABA’s own standards for law school quality, and therefore seems substantively indistinguishable from other standard-setting conduct. See *supra* notes 79-81 and accompanying text. Similarly, SSOs that issue product safety and quality standards frequently maintain product certification programs to verify that particular products comply with the relevant standard. For example, ANSI oversees a number of accreditation and certification bodies that issue opinions as to whether a particular product or process complies with the appropriate ANSI standard. See ANSI, *ANSI Standards Boards*, at [http://web.ansi.org/standards\\_activities/standards\\_boards\\_panels/overview.aspx?menuid=3](http://web.ansi.org/standards_activities/standards_boards_panels/overview.aspx?menuid=3) (last visited March 24, 2004). ASME, NFPA and other organizations perform similar functions; indeed, it was for abuse of this very certification function that the Supreme Court found ASME liable in the *Hydrolevel* case. See *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982); see also *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (holding illegal an organization’s denial of a certain certification).

<sup>43</sup> Namely, commercial groups will have weaker claims to First Amendment protection. Legal liability against a genuinely political, non-commercial organization on the basis of some “standard” it has issued might unlawfully impinge the group’s First Amendment rights of speech,

important to remember that private standards are by no means *malum in se*, for indeed, nothing but the most rudimentary economy could persist without some things that on this definition are “standards.”<sup>44</sup>

In any event, this case study is concerned with only one special species of standardization: that in which a non-governmentally formulated policy comes to have force through some action of “government” as traditionally conceived, either by direct adoption of a standard or through some other “government” act.<sup>45</sup> This would exclude quite a significant range of conduct that must fall within any reasonable definition of “standard,” all of which seems exceptionally interesting in its own right, but which does not relate to the problem in the case study.

A primary legal norm to which SSO standards may be subject is antitrust. Admittedly antitrust is not the only possible norm,<sup>46</sup> but the focus on antitrust is not a case of seeing every problem as a nail because the only tool at hand is a hammer. I have chosen to study antitrust as applied to SSOs because it is in that context that the instinct of the courts to treat SSOs as “private” poses issues and causes consequences that are interesting to examine as a case study. Moreover, the antitrust issue seems especially interesting because, unlike other possible norms, antitrust could by rough proxy mandate concern for the public interest and adequate process<sup>47</sup> by policy making bodies not otherwise

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assembly and petition, as set forth in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and the individual members’ rights of association as set out in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). However, as was made clear in both *Claiborne Hardware* and *Roberts*, as well as *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990), these constitutional rights are much narrower in commercial contexts—i.e., the typical standard setting context—than in personal or genuinely political ones. See *Trial Lawyers*, 493 U.S. at 425-28; *Roberts*, 468 U.S. at 619-20; *Claiborne Hardware*, 458 U.S. at 912. See generally *infra* notes 129-135 and accompanying text.

<sup>44</sup> A manufacturer of televisions, for example, must purchase a range of component parts from a range of potential suppliers, and can effectively make cost and quality comparisons only if those items are standardized. The manufacturer also must make design choices in anticipation of standardized component specifications. Theoretically, a public body could be charged to devise all such standards, but the sheer scope of the task seems prohibitive. Thus, the only alternative to some sort of non-governmental standardization would be ridiculous extremes, for example, total vertical integration in all productive endeavors.

<sup>45</sup> Government adoption of a standard is therefore to be distinguished from so-called “de facto standards,” which come to have influence through the operation of market forces, and from situations in which a standard acquires force through the actions of non-governmental third parties, as is often the case where insurers or major purchasers mandate that some producer comply with the standards of an SSO.

<sup>46</sup> In theory, a “standard” could be regulated by other norms, such as the common law of fraud or defamation, the state law of business torts, or federal consumer protection law.

<sup>47</sup> As Einer Elhauge observed, antitrust law mandates a concern for the public interest, at least as to resource allocations, even as to decisionmakers who are not subject to democratic constraints. See Elhauge, *Scope*, *supra* note 3, at 707-08. In the case of an SSO, antitrust law would require that its standards not “unreasonably restrain trade,” and that they thereby comport with a basic substantive choice adopted by our polity as to our common good. See *id.* at 709. Susceptibility to antitrust law would also likely encourage SSOs to eliminate procedural abuses in their deliberations. See *supra* note 19 and accompanying text.

constrained by due process or administrative law.<sup>48</sup> Thus, it seems significant that the one likely means by which SSO behavior might be monitored effectively is unavailable because of the public-private distinction.

In any event, a standard may constitute a restraint of trade subject to rule of reason review<sup>49</sup> generally on the theory that it amounts to a boycott of a competitor disfavored by it.<sup>50</sup> This is not so clearly the

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<sup>48</sup> No matter how powerful it is, an SSO likely would not be subject to the legal rules that impose concern for the public interest on traditional governmental bodies. Thus, neither constitutional or administrative law is likely to be much help, even where an SSO is effectively doing the government's regulatory business. Privately-organized SSOs are only rarely subject to federal or state constitutional guarantees, even where they become closely entwined with state entities. See *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988) (holding that the NCAA was not susceptible to suit under federal civil rights law for due process violations, even where a member school punished its employee—plaintiff Tarkanian—on the NCAA's insistence and under threat of expulsion from the NCAA). But see *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 302 (2001) (holding private non-profit entity subject to liability for "state action" where entity was created by and chiefly comprised of public secondary schools, was the only regulatory body within the state with oversight of secondary school athletics, and its entwinement with state government was "overwhelming"). Indeed, it is relatively difficult to bring a private entity within constitutional cognizance under current Supreme Court jurisprudence, even when the entity is created by federal statute. Amtrak, for example, must comply with at least some constitutional restrictions because the details of its structure make it sufficiently "governmental." See *Lebron v. Nat'l Rail Passenger Corp.*, 513 U.S. 374 (1995). The former Conrail, by contrast, while also created by federal statute and subject to numerous federal statutory constraints, was not, in the Court's view, so closely identified with the government and, accordingly, was not subject to constitutional restrictions that otherwise would have applied. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

Nor is the non-delegation doctrine, which limits the congressional delegation of legislative power, likely to be of much help to those challenging an SSO's alleged disregard for the public interest. It is very unlikely this doctrine would apply to the purely de facto delegations characteristic in the SSO context. See Freeman, *supra* note 24. See generally David Schoenbrod, *The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355 (1987).

<sup>49</sup> See *N.W. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294-96 (1985) (discarding the Court's own prior rule holding all horizontal refusals to deal—which would include, for example, the membership standards of a trade organization—to be per se illegal). See generally 1 ANTITRUST LAW DEVELOPMENTS, *supra* note 11, at 103-05.

A few courts have suggested that the promulgation of a standard—resembling as it does a mere statement of opinion—is simply too different in character from traditional trade restraints to be an antitrust concern. See, e.g., *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988). Responding to these decisions requires an article in itself; for present purposes let it suffice to point out that these decisions seem at odds with a significant amount of preceding and subsequent case law. See *infra* notes 89-90, 111-116 and accompanying text, particularly the discussion of the Supreme Court's decisions in *Am. Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). Moreover, the question of whether the conduct at issue in *Schachar* and *Clamp-All* was a restraint or not was in each case a novel one and thus seems problematic. For present purposes I will simply assume that, as a general matter, a commercial SSO is open to antitrust liability for its standards.

<sup>50</sup> See, e.g., *Allied Tube*, 486 U.S. at 492 (holding a member of a fire safety association could be liable under section one of the Sherman Act for unfairly urging passage of a standard, the effect of which would be to frustrate the entry of a new competitor); *Mech. Eng'rs*, 456 U.S. at

case, of course, when the SSO promotes its standard for government adoption, since the limited caselaw on point suggests that such conduct enjoys the petitioning immunity.<sup>51</sup> Thus arises the issue at the heart of this case study.

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572-74 (holding that an SSO could be liable under section one for the acts of its agents, who applied the organization's standards to the detriment of a competitor); *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1961); 1 ANTITRUST LAW DEVELOPMENTS, *supra* note 10, at 110-15 (citing cases).

The standard will likely be held a reasonable restraint where the organization appears to be just an independent group speaking its mind, *see, e.g.*, *Eliason Corp. v. Nat'l Sanitation Found.*, 614 F.2d 126, 130 (6th Cir. 1980) (holding product certification by National Sanitation Foundation Testing Laboratory was reasonable under section one because NSFTL is an "independent organization[] not dominated or controlled by manufacturers [nor] in direct competition with plaintiff"); *Roofire Alarm Co. v. Royal Indem. Co.*, 202 F. Supp. 166, 169 (E.D. Tenn. 1962) (holding the same with respect to product certification by Underwriters Laboratories), or where a not genuinely independent group can at least show that its standard is reasonable and unrelated to attacks against competition, *see, e.g.*, *Hatley v. Am. Quarter Horse Ass'n*, 552 F.2d 646, 653 (5th Cir. 1977) (holding rule governing registration of certain breeds of horses not unreasonable under section one because it was "a legitimate tool in the effort to improve the breed"); *see also* *Marjorie Webster Junior Coll. v. Middle States Ass'n of Colls. and Secondary Schs.*, 432 F.2d 650, 654-55 (D.C. Cir. 1970) (finding that the Sherman Act did not apply to the actions of an independent, non-profit body that accredited institutions of higher education, such activities being "not commercial").

However, if the standard is not objective or if its purposes are not reasonable, it can be found unlawful because it operates like a boycott in persuading customers not to purchase non-approved products or services. *See, e.g.*, *Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 357-62 (7th Cir. 1990) (holding AMA ethical standard prohibiting "professional association" between AMA members and chiropractors was unreasonable because its purpose was to bar entry by competitors); *cf. Marjorie Webster*, 432 F.2d at 655 ("The standards set must be reasonable, applied with an even hand, and not in conflict with the public policy of the jurisdiction."). *See generally* 1 ANTITRUST LAW DEVELOPMENTS, *supra* note 10, at 110-15 & n.630; Gerla, *supra* note 38, at 474-76.

<sup>51</sup> *See infra* notes 78-94 and accompanying text.

## B. *The Law of Antitrust Immunity in Précis*<sup>52</sup>

For purposes of the Article, antitrust immunity law can be summarized as follows.<sup>53</sup> First, two distinct classes of defendants may take advantage of immunity from antitrust, state governments and

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<sup>52</sup> At this point I wish to explain a simplification I will adopt for the remainder of this paper: An SSO could seek to have its standard adopted by federal, state, or local government, and the question whether the SSO should be subject to antitrust liability may be answered by different immunity doctrines depending upon whether the government counterpart in question is federal or non-federal. Either way, the SSO might argue for the petitioning immunity, which works the same way any time a person talks to government. But if that immunity is not available—and I propose that it should not be as to powerful SSOs—then immunity will depend on one of two distinct questions. If the SSO's standard is adopted by the federal government but the SSO has no recourse to the petitioning immunity, then it could only be immune from antitrust liability under the rule of *Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963) (providing that antitrust laws do not apply where Congress, in some other act, makes clear an intent to repeal the antitrust laws in that context). When the standard is adopted by a state or local government, by contrast, and there is no recourse to the petitioning immunity, the question will be governed by *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). See *infra* note 101 and accompanying text. In fact, the rationales and even the application of the two doctrines are quite similar. Their evidentiary standards, however, are different, and as a result the doctrines have somewhat different consequences.

However, it seems complex enough in the confines of this essay to explain the interrelations of *Midcal* and the petitioning immunity. Therefore, from here forward, I will ignore the problem of federal adoption of standards and will consider the law only as it applies to adoption by state governments. Happily, all the caselaw relevant to antitrust immunity for SSOs arises in only the latter context, and in any event *Midcal* is a better known and more frequently litigated doctrine than *Silver*.

Moreover, federal and state adoption of standards differ in two other very important respects. First, an SSO whose client is the federal government might, at least in theory, find itself subject to special public interest requirements imposed by the Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-16 (2004). Second, the Office of Management and Budget now imposes what amount to public interest requirements on SSOs who desire federal use of their standards, by way of its recent revisions to Circular A-119, which implements provisions of the National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113, 110 Stat. 775 (codified in scattered sections of 15 U.S.C.). OMB has required executive branch agencies to use any "voluntary consensus" standard that exists and is relevant to a particular procurement or regulatory activity, unless to do so would be "inconsistent with law or otherwise impractical." Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, OMB Circular No. A-119, 63 Fed. Reg. 8,546, 8,554 (Feb. 19, 1998). The OMB's directive specifies, however, that a standard must be used only if it the SSO "is defined by the following attributes: (i) Openness. (ii) Balance of interest. (iii) Due process. (iv) An Appeals process. (v) Consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties . . . ." *Id.* at 8,554.

<sup>53</sup> Incidentally, by "antitrust immunity" I mean those rules that prevent antitrust from applying to the political process. There are other antitrust rules that are occasionally called "immunities" or "exemptions," such as the rule that antitrust does not apply to a fair bit of labor union conduct, professional baseball, ocean liner shipping, and agricultural cooperatives. See generally 2 ANTITRUST LAW DEVELOPMENTS (5th ed. 2003), *supra* note 10, at ch. 15. For a general introduction to the political immunities, see HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE ch. 18 (2d ed. 2000); Sagers, *supra* note 21.



private parties. When state governments are sued in antitrust, it is often to enjoin a state policy that regulates trade and is therefore arguably preempted by the Sherman Act.<sup>54</sup> Such suits essentially always fail. State governments acting *qua* governments are, as the Court sometimes says, “*ipso facto* immune” from antitrust.<sup>55</sup> This rule—the so-called “state action” immunity—reflects the Court’s view that Congress means to leave the states free to fashion their own trade policies however they see fit.<sup>56</sup>

Private persons can also be immune from antitrust, and they can be immune in two situations. First, persons are immune when they “petition” their government. “Petition” remains a curiously undefined word,<sup>57</sup> but it appears to mean essentially any communication that is directed toward government, so long as it is genuine,<sup>58</sup> and that asks for something.<sup>59</sup> There is a line, however, and some arguably “political” conduct has been held to be more “commercial” than “political” and therefore not protected by this so-called *Noerr-Pennington*<sup>60</sup> or “petitioning” immunity.<sup>61</sup> This immunity is sometimes thought to be a

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<sup>54</sup> See, e.g., *Parker v. Brown*, 317 U.S. 341 (1943) (refusing to enjoin a California policy concerning raisin sales).

<sup>55</sup> *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984).

<sup>56</sup> See *Parker*, 317 U.S. at 351 (“In a dual system of government . . . an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”). Note that this generalization is subject to the constraints of the *Midcal* rule. See *infra* text accompanying note 101. Thus, the one exception to the general rule of “state action” immunity is that states may not “deputize” private persons to restrain trade in a way that does not comply with the *Midcal* immunity. See *infra* notes 64-66 and accompanying text.

<sup>57</sup> Indeed, there appears to be no explicit definition anywhere in the antitrust case law; such definitions as can be found appear in other contexts and are useful only by analogy. See Sagers, *supra* note 21, at 936-38; see also *infra* note 66 and accompanying text.

<sup>58</sup> Thus, even conduct that would otherwise be “petitioning” is not immune where it constitutes a “sham.” Petitioning is a sham where a person does not genuinely desire the government act purportedly sought, but rather seeks to harm someone else simply by abusing the political process. See, e.g., *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. at 508 (1972) (refusing to immunize the repeated and allegedly baseless efforts of a trucking company to oppose the grant of a government license necessary for a new competitor to do trucking business within petitioner’s state); see also *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991); 1 AREEDA & HOVENKAMP, *supra* note 10, ¶ 204a.

<sup>59</sup> See *McDonald v. Smith*, 472 U.S. 479, 488 n.2 (1985) (Brennan, J., concurring) (suggesting, in another context, that “petitioning” includes a “broad[] . . . range of communications addressed to the executive, the legislature, courts, and administrative agencies . . . [and] includes such activities as peaceful protest demonstrations.”); cf. Eric Schnapper, “*Libelous*” *Petitions for Redress of Grievances: Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303, 347 (1989) (arguing, in another context, that “petitioning” includes “any peaceable concerted speech or action taken to influence the course of government conduct.”).

<sup>60</sup> As to the origin of the name *Noerr-Pennington*, see *supra* note 8.

<sup>61</sup> Thus, petitioning does not include conduct that in and of itself violates antitrust, such as an economically motivated boycott, even if it is a boycott of a government actor. See *FTC v. Super. Ct. Trial Lawyers Ass’n*, 493 U.S. 411 (1990) (holding illegal a boycott by criminal defense attorneys against any further court-appointed criminal representations until the relevant state government raised the fee for such appointments). Likewise, where the “context and nature” of

First Amendment doctrine, but it is not.<sup>62</sup> Importantly, the protection of the immunity is much stricter than that normally available under First Amendment law, but more limited in scope. When it applies, it protects the defendant only from antitrust.<sup>63</sup>

Second, private persons are immune when a state government has deputized them to restrain trade,<sup>64</sup> so long as the state government has crafted its deputizing policy in conformity with the Supreme Court's immunity law. This is the so-called *Midcal* rule, whereby the state's deputizing statute, regulation, or policy is immune from antitrust liability provided it is (1) "clearly articulated and affirmatively expressed as state policy"; and (2) the policy is "'actively supervised' by the State itself."<sup>65</sup> Curiously, there appears to be no clear explanation anywhere of when a case is a "petitioning" case and when it is a *Midcal* case. One can imagine situations in which either or both of the immunities might apply to the same conduct.<sup>66</sup> Interestingly, it is from precisely this ambiguity that the issue in this Article arises.<sup>67</sup>

Short of the scattered collection of offhand metaphors and dicta cited by some lower courts,<sup>68</sup> the Supreme Court has never indicated that any question of antitrust immunity should be resolved according to notions of "public" or "private."<sup>69</sup> In fact, reference to the distinction really makes no sense, because it serves neither any apparent antitrust

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the challenged conduct renders it more like "commercial" than "political" conduct, it is not "petitioning." See *Allied Tube*, 486 U.S. at 507-09 (1988) (holding that conduct within a closed-door meeting of an SSO was not "petitioning" even though the model standard that would be the product of that meeting would likely be adopted verbatim by many state and local governments).

<sup>62</sup> See Sagers, *supra* note 21, at 928-31.

<sup>63</sup> This is so because where the immunity applies, any antitrust cause of action is utterly dead, no matter whether application of antitrust in the particular case is "content neutral," and regardless of what "state interests" might be at stake. See *supra* note 30 and accompanying text.

<sup>64</sup> Strictly speaking, this second scenario of immunity for private "persons" includes immunity for state government agencies—as opposed to states acting qua states—and local governments. Such entities do not enjoy the *ipso facto* immunity of state legislatures and supreme courts, though they do have a somewhat easier time of securing the *Midcal* immunity than do other non-state entities. See HOVENKAMP, *supra* note 53, at ch. 18.

<sup>65</sup> *Midcal*, 445 U.S. at 105. Much more on the law of *Midcal* below. See *infra* notes 75, 101-106 and accompanying text. As discussed there, the two-pronged structure of the *Midcal* test is an important feature of the doctrinal proposal presented in my case study.

<sup>66</sup> In *A.D. Bedell Wholesale Co. v. Phillip Morris Inc.*, 263 F.3d 239 (3d Cir. 2001), for example, the court analyzed particular conduct under both doctrines, noting that "there is substantial overlap as both 'work at the intersection of antitrust and governance.'" *Id.* at 250 (quoting David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J. L. & PUB. POL'Y 293, 300 (1994)). The court gave no explicit consideration to the question of which doctrine should apply, and rather simply applied both separately, ultimately holding that a settlement between tobacco manufacturers and state government plaintiffs was immune under the petitioning immunity but not under the *Midcal* doctrine. See *id.* at 250-61.

<sup>67</sup> See *infra* notes 96-106 and accompanying text.

<sup>68</sup> See *infra* notes 108-110 and accompanying text.

<sup>69</sup> See *infra* notes 111-114 and accompanying text.

policy,<sup>70</sup> nor any clearly indicated aspect of congressional purpose,<sup>71</sup> nor any rule of constitutional law.<sup>72</sup> Rather, the immunities rules are best understood to require that resource allocations be made only by free and healthy markets, or by democratically accountable actors, because it is only by these methods that we have some assurance that allocations are made in the public interest.<sup>73</sup> This analysis focuses on the location of the actual decision-making, not the "cause" of the challenged harm (which may be no more than a state's pro forma enforcement of decisions actually made by a "private" entity<sup>74</sup>) or whether that "cause" was public or private.

But most important, on a more careful review of the Supreme Court cases, it is evident that *as a matter of logical necessity* the "public" or "private" nature of the "cause" of some antitrust harm *cannot be relevant*. If it were then one of the Supreme Court's own leading decisions would be incorrect.<sup>75</sup> Surprisingly, the lower federal

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<sup>70</sup> If it is true, as is now almost universally agreed, that the purpose of antitrust is to encourage resource allocation (and perhaps dynamic efficiencies) through healthy competitive markets, then harms caused by state-imposed trade restraints pose no different problem for antitrust than "private" restraints. Moreover, though neither the Sherman Act nor the Clayton Act explicitly defines "person" to include the states, *see* 15 U.S.C. §§ 7, 12(a), there is no question that in appropriate circumstances they be made defendants subject to injunctive correction of improper trade restraining actions, *see, e.g., Midcal*, 445 U.S. at 105, though there may be doubt whether private plaintiffs may appropriately bring such claims.

<sup>71</sup> *See* Elhaug, *Scope*, *supra* note 3, at 697-704 (analyzing the legislative history of the antitrust laws for evidence of congressional intent to subject state governments to enforcement). Elhaug concludes that while "the legislative history is remarkably fuzzy," *id.* at 698, one's view of Congress's intent cannot reasonably be cabined in any formal distinction between "public" and "private."

<sup>72</sup> *See infra* Part III.D.

<sup>73</sup> *See* Elhaug, *Making Sense*, *supra* note 8, at 1195-98; Elhaug, *Scope*, *supra* note 3, at 696-97.

Indeed, Professor Elhaug makes a persuasive case that only this theory of resource allocation can coherently explain the Supreme Court's immunities jurisprudence. *See* Elhaug, *Scope*, *supra* note 3, at 683-96. As to the petitioning immunity, strictly speaking, Elhaug does not claim that his view explains *all* of the Supreme Court case law, because he believes that in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), the Court essentially jettisoned the approach of the initial trio of cases that defined the doctrine (namely, *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)). He does believe, however, that his view explains all the modern Supreme Court case law. *See* Elhaug, *Making Sense*, *supra* note 8, at 1193-1203.

<sup>74</sup> *See, e.g., Midcal*, 445 U.S. at 104-06.

<sup>75</sup> Namely, the public-private distinction cannot explain the difference between *Midcal* and the Court's fundamental immunity decision, *Parker v. Brown*, 317 U.S. 341 (1943). Both cases involved California state trade policies in which prices for a particular product were set by private persons according to a pre-existing statutory directive and then enforced by the state. However, the restraint was immune in *Parker* but not in *Midcal*. In other words, even though the coercive act that enforced the restraint in *Midcal* was easily and conclusively traceable to the state itself—the private restraint was made at the state's invitation and would have been ineffective without state enforcement—the restraint was *not* immune from antitrust liability. The only reasonable explanation is that the statute in *Midcal* set up a decision-making process that allowed prices to be set by financially interested actors subject to no democratic restraints.

courts—promoting the public-private distinction as they do—have failed to notice this tension.

In any event, the doctrinal proposal discussed below is simply that where an SSO becomes so powerful that it is effectively able to write a state government's policy, it should not be protected by the petitioning immunity, because it has ceased to be, in any real sense, the individual seeking redress for whom the immunity was devised. Rather, as the recipient of a delegation of state power it should be subject to antitrust unless it can show that both elements of the two-prong *Midcal* rule—devised to handle state government deputies—are satisfied.<sup>76</sup> The important consequence of this approach would follow from the second prong of *Midcal*, which requires that a state “actively supervise” the conduct of any entity that it has deputized to restrain trade.<sup>77</sup> The thrust of this proposal is that application of the *Midcal* rule would subject the SSO to some rough proxy of a mandate for the public interest—either through “active supervision” or through exposure to antitrust.

### C. Current Caselaw Concerning SSO Immunity

The Supreme Court has never faced the question of whether an SSO could be liable for harms flowing from a government-adopted standard,<sup>78</sup> but the few lower courts to have reached it have answered with a resolute no. As it happens, a fair bit of this law concerns the standard setting conduct of the American Bar Association, and in particular its accreditation of law schools<sup>79</sup>—the largely forgotten history of which is chilling, reading like the history of any typical price-fixing conspiracy.<sup>80</sup> ABA accreditation indeed is among the clearest cases of outright delegation of state power,<sup>81</sup> and yet a federal court of

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<sup>76</sup> See *infra* note 101 and accompanying text.

<sup>77</sup> See *infra* text accompanying notes 105.

<sup>78</sup> One's view here depends on how one reads a few snippets of dicta in the *Allied Tube* opinion. See *infra* notes 108-114 and accompanying text (discussing the dicta).

<sup>79</sup> ABA accreditation is “standard setting” because the ABA makes its decision to accredit or not on the basis of its own internally devised standards of minimal law school quality. See Shepard & Shepard, *supra* note 22; see also *infra* note 84 and accompanying text.

<sup>80</sup> See Shepard & Shepard, *supra* note 22, at 2114-27. That history, perhaps, is also shaded with more sinister overtones, reflecting as it did a fear that low quality law schools would produce too many Jewish lawyers. See *id.* at 2118-19.

<sup>81</sup> This is so because the delegation to the ABA is prospective and in practice the states make it without ongoing supervision. Typically a state's attorney ethics authority—usually its Supreme Court—will adopt a formal policy statement providing that persons may take the normal bar examination only if they have graduated from an ABA-accredited school. Since this policy statement will normally remain unamended while the ABA remains free to amend its accreditation standards, the state will in every way *except* absolutely explicitly have delegated its regulatory power to the ABA on a prospective and ongoing basis. See Shepard & Shepard, *supra* note 23, at 2122 & n.76.

appeals and two district courts have held that it enjoys the petitioning immunity.<sup>82</sup> In *Massachusetts School of Law at Andover v. American Bar Association*<sup>83</sup> the Third Circuit seemed almost shocked by an unaccredited law school's suggestion that the ABA could ever be liable in such a case, since the "harm"—denial to its students of access to the bar exam—was "caused" by the state governments, not the "private" defendant.<sup>84</sup> Indeed the court was openly puzzled by the school's invocation of *Midcal*, in which the school argued that petitioning immunity was inapt on the facts and that the ABA could only be immune if it satisfied the *Midcal* test.<sup>85</sup>

In a slightly different context, the court in *Lawline v. American Bar Association*<sup>86</sup> held the ABA immune solely because the harms alleged—Illinois' adoption of ABA model ethical rules which allegedly restrained trade—were said to be acts of the state.<sup>87</sup> Admittedly, no state adopts

<sup>82</sup> See *Mass. Sch. of Law at Andover v. Am. Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997); *Pawlak v. Nix*, No. 95-5265, 1996 U.S. Dist. LEXIS 14523 (E.D. Pa. Oct. 19, 1996); *Zavaletta v. Am. Bar Ass'n*, 721 F. Supp. 96 (E.D. Va. 1989); see also *Sherman Coll. of Straight Chiropractic v. Am. Chiropractic Ass'n*, 813 F.2d 349 (11th Cir. 1987) (holding, under very similar circumstances, an organization that accredits chiropractic schools immune from antitrust liability).

<sup>83</sup> 107 F.3d 1026 (3d Cir. 1997).

<sup>84</sup> Having held that because MSL's antitrust injury "is the result of state action [namely, the states' decision not to let MSL's graduates take the bar], and thus is immune from antitrust under the doctrine of *Parker v. Brown*," the court reasoned that "[b]ecause the states are sovereign in imposing the bar admission requirements, the clear articulation and active supervision requirements urged by MSL are inapplicable." *Id.* at 1036.

As mentioned, the Eleventh Circuit has also considered immunity as to a body concerned with accreditation of chiropractic schools, see *supra* note 35, but the facts and reasoning were similar to those in *MSL*. See *Sherman Coll.*, 813 F.2d at 349. The reasoning in the two district court opinions, see *supra* note 35, is also similar. In *Zavaletta*, for instance, the court reasoned that

[i]n accrediting a law school, the ABA merely expresses its educated opinion—at the school's request—about the quality of the school's program. This information is provided to state supreme courts and bar examiners, who have the sole power to determine if a school's graduates are entitled to sit for the bar examination or practice in their states.

721 F. Supp. at 98; see also *Pawlak*, 1996 U.S. Dist. LEXIS 14523, at \*35-39.

<sup>85</sup> Judge Greenberg, writing for the panel, noted that "MSL argues on appeal that the [petitioning immunity does] not apply here because private anti-competitive conduct is immunized only where it is (1) clearly and affirmatively authorized by state policy, and (2) actively supervised by the state." *Massachusetts School of Law*, 107 F.3d at 1035. But, you might be thinking, that argument is based on *Midcal*, not on the petitioning immunity; the two factors listed are the *Midcal* test, which deals with situations in which a defendant claims to be acting under previously granted state permission to restrain trade. See *infra* note 101 and accompanying text. Judge Greenberg, however, seemed puzzled by MSL's argument and took it as evidence that MSL's lawyers had misunderstood the case. As for their reply brief, he observed that "MSL continues to miss the crucial point that it is the direct action of the states which causes its injury and continues to discuss cases where private conduct caused the alleged antitrust injury." *Massachusetts School of Law*, 107 F.3d at 1036 n.9.

<sup>86</sup> 956 F.2d 1378 (7th Cir. 1992).

<sup>87</sup> *Id.* at 1383 ("The disciplinary rules at issue . . . were adopted by the Illinois Supreme Court" and "[i]t is because of their adoption by [a] governmental bod[y] that plaintiffs are

ABA model ethics rules verbatim and without deliberation, and therefore *Lawline* seems less like a case in which a state has effectively deputized the defendant.<sup>88</sup> However, even as to advisory ethical opinions issued by the ABA, which are extremely influential in the United States, and which seem factually closer to a rubber-stamping situation, the court held that “when a trade association provides information . . . but does not constrain others to follow its recommendations, it does not violate the antitrust laws.”<sup>89</sup> Thus, though the ABA’s advisory opinions had significant law-making influence as a practical matter, and the Supreme Court has held SSO advisory opinions susceptible to antitrust when there is no petitioning involved,<sup>90</sup> the *Lawline* court brushed aside the plaintiff’s claims because there was “state action” at stake.

Finally, in a different context, *Sessions Tank Liners, Inc. v. Joor Manufacturing Co.*<sup>91</sup> found immunity for an individual who joined an influential SSO with the purpose of destroying a competitor, and who succeeded through deliberate fraud on the SSO’s rulemaking body.<sup>92</sup> Characterizing the issue before it as whether “a private party can be held liable . . . for anticompetitive restraints resulting from valid government action,”<sup>93</sup> the court found that the only harm at issue flowed from

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supposedly restrained from practicing law.”). The plaintiff was a Chicago-based start-up company that wanted to provide legal advice over an 800-number hotline. The company wanted to employ paralegals and other non-lawyers to provide this advice, contrary to ethical rules promulgated by the ABA and adopted by the Illinois state ethics authorities.

<sup>88</sup> Though the significance of the ABA’s lawmaking power in this respect should not be understated, the *Lawline* court’s treatment of the problem seems rather glib. When the ABA promulgated its first major modern ethical code, the Code of Professional Responsibility, it was very quickly adopted by forty-nine states with virtually no changes. See Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 338-39 & n.12 (1994). There is now significant variation amongst state ethical regimes. See *id.*; see also Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 FORDHAM URB. L. J. 969, 972 (1992). Variation, though, does not change the fact that the ABA once essentially wrote the law in this area and might someday do so again.

<sup>89</sup> 956 F.2d at 1383 (quoting *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989)) (quotation omitted).

<sup>90</sup> And thus it is curious that the *Lawline* court completely ignored *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), both cases finding liability on the basis of issuance of opinions and both decided years earlier. See also *Cal. Dental Ass’n v. FTC*, 526 U.S. 756 (1999).

<sup>91</sup> 17 F.3d 295 (9th Cir. 1994).

<sup>92</sup> The case was an antitrust suit against Joor, a manufacturer of tanks for containment of hazardous liquids. Plaintiff Sessions offered an alternative service in which it would cut open leaking tanks and line them with an epoxy. Tank lining was a cheaper process than tank replacement because it required less labor and was less disruptive to the tank owner’s business. Lining, however, required a permit from local fire officials, and, as the *Joor* court itself found, if the SSO’s fire safety code prohibited it, then the service offered by Sessions would effectively be banned. See 17 F.3d at 297. The code, as the court explained, was routinely rubber-stamped into law by local governments, and even where it wasn’t explicitly adopted local fire officials would refuse permits for conduct not in compliance with the code. See *id.*

<sup>93</sup> *Id.* at 298.

adoption of the SSO's standard by local governments and held that that fact rendered the defendant immune.<sup>94</sup>

### III. AN ALTERNATIVE: WHO, AFTER ALL, IS THE GOVERNMENT?

The issue, then, is joined. The remainder of this Article elaborates the technical proposal, which is that, in the case of powerful SSOs, the courts should make use of the existing *Midcal* doctrine and ignore the petitioning immunity. The goal of this proposal is to allow for a resolution that disregards the problematic public-private distinction and yet produces results that are judicially manageable and are consistent with those policies of antitrust and constitutional law that are implicated. Little is left to be said about the normative foundation of the proposal, since it is merely that the current caselaw, committed as it is to the concepts "public" and "private," appears to make a donation of government power, the recipients of which need not comply with democratic constraints and will normally escape essentially any judicial or regulatory scrutiny.

The heart of the case study, as was mentioned earlier, is in addressing potential counter-arguments. It examines each of the negative policy consequences that allegedly follow from any disregard of "privacy," offering such reasons as present themselves for why the alleged bad consequence either seems not to follow or is, in fact, not so bad. This section is most important because the policy counterarguments made to proposals like this one tend to be based on those very liberal instincts that underlie the public-private distinction.<sup>95</sup> The goal of the case study is to ask whether these liberal instincts, however powerful they might be, really have so much going for them. In other words, this proposal is offered mainly to set a hypothetical stage on which to reach the important issues. It bears repeating that because the purpose of the Article is not to *win* as to any particular point of legal doctrine, the analysis is useful even if the proposal cannot be shown to be perfect or seamless.

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<sup>94</sup> See *id.* at 298-300. The court distinguished the Supreme Court's *Allied Tube* decision, discussed *infra* notes 107-114 and accompanying text, by noting that in that case the damages sought were based exclusively on injuries found by the district court to be caused by "incidental" market effects of the standard and not by its adoption by states. See *id.* at 299; see also *infra* notes 115-116 and accompanying text (explaining why this distinction is not relevant).

<sup>95</sup> See *infra* Part III.C.

A. *Fixing the Metaphysics: Petitioning, Midcal and the De Jure Delegation Problem*

1. The Proposal

The proposal itself is simple—and again one insight of the study is its very simplicity. Antitrust caselaw should be revised to make clear that the petitioning immunity does not protect an SSO when it is *effectively* a *Midcal* defendant. That is, when an SSO's relationship with a state government is such that the SSO is effectively able to write the state's law, then it should not be treated simply as a private petitioner, but rather as a delegate of state power that can enjoy immunity only if it can satisfy the *Midcal* test.<sup>96</sup> Determining when a defendant is “effectively” a *Midcal* defendant would be a problem for caselaw development by the courts,<sup>97</sup> the guiding star being whether the historical relationship between state and SSO indicates that the SSO can effectively write the state's policy.<sup>98</sup>

This doctrinal revision could be accomplished by judicial decision or could be legislated, though legislation in the SSO area seems likely to be problematic.<sup>99</sup> As a practical matter this could be done through an authoritative opinion or legislative enactment to the effect that where a defendant is “effectively a *Midcal* defendant,” the petitioning immunity cannot protect the defendant. In any case, if powerful SSOs are really just *Midcal* defendants, this proposition seems fairly straightforward. As mentioned above, “petition” remains a nebulous word, but it is clear that the sort of conduct that is normally at issue in a *Midcal* case—restraint of trade by a person wearing a previously granted state deputy star—is not “petitioning.”<sup>100</sup> Otherwise, *Midcal* itself would be swallowed by the petitioning immunity—the Court would have needed only the latter doctrine.

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<sup>96</sup> The reason that it is often not obvious that an SSO is a “*Midcal* defendant” is the misleading way in which the *Midcal* test itself has been phrased; this problem will be addressed presently. See *infra* Part III.A.2.

<sup>97</sup> Since the question of immunity is a question of law for the court, it will typically be resolved in the court's ruling on a motion to dismiss under FED. R. CIV. PROC. 12(b)(6) or a motion for summary judgment, providing a fortunate opportunity for exposition through written opinions.

<sup>98</sup> This point seems inevitably to draw the strongest concern of any in the article; it is addressed more fully below. See *infra* pp. 1463-1464.

<sup>99</sup> Cf. *supra* note 15 and accompanying text.

<sup>100</sup> See *supra* note 66 and accompanying text.



## 2. Fixing *Midcal*

The basic problem that courts seem to struggle with is that the SSO will basically never enjoy anything that to a court looks like a de jure delegation of government power. This is probably in part because the *Midcal* test itself is been phrased in a misleading manner, such that it is counterintuitive to many judges that a defendant like an SSO—which normally has no formal delegation of authority—could be a candidate for *Midcal* immunity but not the petitioning immunity. Thus, a technical piece of the proposal is that the *Midcal* test should be rephrased slightly.

The test currently requires the defendant to show both of the following:

1. That “the challenged restraint [is] ‘one clearly articulated and affirmatively expressed as state policy;’” and
2. That “the policy [is] ‘actively supervised’ by the State itself.”<sup>101</sup>

The problem is that by requiring a “clearly articulated and affirmatively expressed . . . state policy,” the Court has led the lower courts to believe that there must be some very clear, lengthy and detailed government directive that individuals restrain trade. It has seemed plain to the courts that the “de facto” delegation of state power to SSOs does not satisfy this element.

Making my proposal work requires a softening of this de jure delegation requirement. Fortunately, such softening is also supported by two strong policy reasons. First, the underlying rationale of the clear articulation policy is not served by excluding de facto delegees from *Midcal*. When a state has made some de facto delegation of authority the state has done what the Court wants before it will entertain a private defendant’s claim to antitrust immunity—namely, the state has undertaken some conscious deliberation concerning the delegation.<sup>102</sup>

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<sup>101</sup> Cal. Retail Liquor Dealers Ass’n v. *Midcal* Aluminum, Inc., 445 U.S. 97, 105 (1980).

<sup>102</sup> The rationale is that before the Court is willing to immunize private defendants from antitrust, it wants the states actually to do their jobs, to invoke their legislative processes, and consider whether delegating the power to restrain trade is in fact a desirable policy under the circumstances. See *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992) (stating that the clear articulation element is “directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy”); Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. REV. 1059, 1109 (2000) (stating that the clear articulation requirement “is designed to ensure that even an authorized state decision-maker does not repeal the fundamental national policy of the antitrust without . . . a deliberate decision to act in that way”); Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L. J. 486, 501 & n.84 (1987) (explaining this point). Again, the antitrust immunities rules serve to ensure that resources will be allocated only by those who are subject to democratic constraints or antitrust

Second, a strict *de jure* requirement has the perverse consequence that the SSO would enjoy immunity in many cases where the state has *failed* to fulfill its role as lawmaker, but would not enjoy immunity under the same facts if the state had *made* a formal delegation.<sup>103</sup> In addition to the fact that nothing could commend this bizarre result, it seems contrary to the policy of federal-state comity underlying the *Midcal* caselaw.<sup>104</sup>

Therefore, the first *Midcal* element should be rewritten so that the defendant can invoke the doctrine by showing that:

“1. [T]he challenged restraint [is] ‘one clearly articulated and affirmatively expressed as state policy, [or is made under such circumstances that the defendant is effectively able to write state policy].’”<sup>105</sup>

Note that this revision leaves the second prong of *Midcal* unchanged. In order to secure *Midcal* immunity, the SSO would still have to show that the state actively oversees its standard setting. Moreover, under this proposal the SSO would have no recourse to the petitioning immunity. Therefore, in a situation like ABA law school accreditation, in which states have, for all practical purposes, delegated to the ABA the power to restrain trade but “the policy [is not] ‘actively supervised’ by the State itself,”<sup>106</sup> there would be no chance of immunity and the ABA would be answerable in antitrust if it abuses its authority.

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constraints. See *supra* note 70. *Midcal* thus requires as one necessary condition that the delegation be made in the first instance by democratically accountable decisionmakers. In *de facto* delegation cases—for example, where SSO standards are incorporated by reference—the states have actually done that. I don’t think they’ve done a *good* thing; I think they’ve given too much public power away. But they have done what the Court has asked in the first prong of *Midcal*.

<sup>103</sup> In other words, under *Midcal* as it currently stands, where a state government *fails* to pass a law granting *de jure* power to an SSO, but rather simply acts as though it had done so, then that government—by *shirking* its constitutional role—has essentially granted antitrust immunity to the SSO; without formal delegation the SSO is likely to be immune under the petitioning doctrine.

This problem is well demonstrated by the case of ABA accreditation. Most states have effectively made the ABA their regulator of law schools. However, no state “actively supervises” the ABA’s accreditation work. Thus, if the ABA *had* received a “clearly articulated” delegation it would not be immune under *Midcal* and it would likely not be immune under the petitioning immunity because, again, *Midcal* defendants don’t look to the courts like “petitioners.” Thus, if the ABA *had* received a formal delegation it would *not* be immune, but since it has received only an informal (but no less powerful) delegation, it *is* immune.

<sup>104</sup> See *Parker v. Brown*, 317 U.S. 341, 351 (1943) (“In a dual system of government,” explained the Court, “in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”).

<sup>105</sup> *Midcal*, 445 U.S. at 105 (citations omitted).

<sup>106</sup> *Id.* (citations omitted).

B. *The First of the Counter-Arguments: The Problem of Allied Tube*

The first of the several counter-arguments is a strictly legal one and arises because of a snippet of dicta in the important case of *Allied Tube & Conduit Corp. v. Indian Head, Inc.*<sup>107</sup> There, the Court considered whether a member of an SSO could be liable in antitrust when it manipulated the SSO's procedures in order to adopt a standard that would exclude one of its rivals. Though it may not immediately be obvious, the problem caused by *Allied Tube* has to do with the public-private distinction because, I would submit, there are two ways to read the case and the reading one chooses depends on whether or not one thinks the distinction is important.

The *Allied Tube* defendant raised a claim to petitioning immunity on the theory that the SSO's standards were so influential that petitioning the organization was the same as petitioning the government. In deflecting that claim, the Court explicitly noted that "[n]o damages were awarded for injuries stemming from the adoption of [the standard] by governmental entities."<sup>108</sup> This language has commonly been read as a holding that where a harm is caused by government adoption of a standard, neither the SSO nor any of its members can be liable for it.<sup>109</sup> However, the important and widely overlooked fact is that this statement was not about the Court's view on the "state action" issues, but about *Allied Tube's* own procedural posture. The question of whether the petitioning immunity must apply where the challenged harm flows from government adoption of a standard was not before the Court.<sup>110</sup>

Moreover, *Allied Tube* itself suggests how flimsy and inadequate

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<sup>107</sup> 486 U.S. 492 (1988). *Allied Tube* held that a private business that is a member of an SSO will not necessarily enjoy the petitioning immunity when it petitions the SSO itself, even though the SSO may be so powerful that its code will be rubber-stamped into law.

<sup>108</sup> *Id.* at 498; see also *id.* at 498 n.2. The Court further characterized its holding as follows: [W]e hold that at least where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that party enjoys no [petitioning] immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.

*Id.* at 509-10.

<sup>109</sup> See, e.g., *Sessions Tank Liners, Inc. v. Joor Mfg. Co.*, 17 F.3d 295, 298-300 (9th Cir. 1994).

<sup>110</sup> The defendant manufacturer lost at trial by jury verdict on the substantive antitrust claim. The district court, however, granted a judgment notwithstanding the verdict on the petitioning immunity theory. The Second Circuit reversed, see *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 817 F.2d 938 (1987), and the Supreme Court affirmed the Second Circuit. As discussed, the Court also agreed with the Second Circuit's finding that none of the damages awarded against *Allied Tube* were based on injuries caused by adoption of the NFPA code by a government. See *supra* text accompanying note 108.

the “public-private” approach is to immunities law, and reflects a more holistic and subjective approach to immunity than even the Court’s own precedents.<sup>111</sup> First of all, notwithstanding that the defendant’s purpose was unquestionably to secure a change in state law—indeed, *notwithstanding that the defendant succeeded in that goal*—the Court found that in the context of lobbying in a powerful SSO the risk of abuse was simply too great to remove the conduct from antitrust scrutiny completely. This was the case despite the Court’s acknowledgment of the similarity to lobbying before an actual legislature, which in itself clearly would be immunized.<sup>112</sup> The Court made clear, through extensive discussion, that what matters is the *context* of the decision-making, not the formal act of adoption or enforcement.<sup>113</sup> Thus, in the end, Justice Brennan was willing to hold that however much the conduct before the Court might look “political,” it was in fact “commercial.”<sup>114</sup>

Consider, incidentally, whether the defendant in *Allied Tube* should have been immunized had there been no evidence of independent market effect. The defendant was the most powerful producer of its product in the United States and it stood to gain from excluding the plaintiff’s product from the SSO’s code—and thereby from much state law. Its conduct was fundamentally dissimilar from petitioning in other traditional avenues of political expression and, as

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<sup>111</sup> It is true that *Allied Tube* repeated a few formalistic talismans of prior case law, including that immunity applies where “a restraint . . . is the result of valid governmental action, as opposed to private action,” 486 U.S. at 499 (quoting *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961)), but only in dicta. Indeed, *Allied Tube* took such a new approach that one influential commentator believes it effectively jettisoned all the Court’s prior petitioning immunity case law. See *supra* note 73.

<sup>112</sup> Such lobbying would be immune both as to harms caused by adoption of a law and by incidental market effects, as the *Noerr* Court had held. See *Allied Tube*, 486 U.S. at 504. In other words, the Court was aware how similar the petitioning of a powerful SSO is to the public relations campaign in *Noerr*, which was held to be immune because it was “incidental” to a valid effort to influence state policy. *Noerr*, 365 U.S. 127.

<sup>113</sup> Justice Brennan began by admonishing the lower courts carefully to consider all the facts and circumstances surrounding the petitioning conduct, for “the applicability of *Noerr* immunity” depends not just on the simplistic fact *vel non* of some government involvement, but on “the context and nature of the [petitioning] activity.” *Allied Tube*, 486 U.S. at 499. As for the facts of the case before the Court, he noted that “the activity at issue here did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but within the confines of a private standard setting process.” *Id.* at 506. Justice Brennan further explained that “where, as here, the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty concluding that the restraint has resulted from private action.” *Id.* at 502. Justice Brennan wrote: “We cannot agree . . . that the *Noerr* doctrine immunizes every concerted effort that is *genuinely intended* to influence governmental action.” *Id.* at 503-04 (emphasis added). The Court “thus conclude[d] that the *Noerr* immunity of anticompetitive activity *intended* to influence the government depends not only on its impact, but also on the *context and nature of the activity*.” *Id.* at 503-04 (emphasis added).

<sup>114</sup> *Id.* at 507.

explained below, was not protected by the First Amendment.<sup>115</sup> The only plausible reason to immunize such a defendant is the public-private distinction itself. Therefore, there is support for my reading of *Allied Tube*, and reason to think that that the opportunity given by its procedural posture should be taken.<sup>116</sup>

C. *The Policy Problem: The Heart of the Public-Private Instinct*

Next, several counter-arguments of a policy nature arise, which also seem driven by the liberal instinct in favor of the public-private distinction. In particular, it is said that failure to hold SSOs harmless for wrongs “caused” by government will (1) chill socially useful conduct; (2) require judges to draw a line that is too difficult to draw in practice, thus threatening even further the valuable conduct of SSOs; and (3) intrude upon constitutionally protected speech. As I’ve been at pains to stress, it is not my purpose to prove absolutely that these counter-arguments are wrong, so much as that they might not be so essential or unavoidable as they are thought to be, and thus that the traditional distinction is neither a law of nature nor a logical necessity.<sup>117</sup>

While it may be desirable for states to devolve policy-setting authority onto expert bodies, since they themselves may lack resources or expertise, it is a separate question to whom they should give that power. In cases like *Sessions Tank Liners* and *Allied Tube*, for example, state governments had given their power away to combinations of horizontal competitors which, if the petitioning immunity were to apply,

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<sup>115</sup> See *infra* notes 126-135 and accompanying text.

<sup>116</sup> People sometimes rely on other snippets of language here and there in the case law, but that other language is similarly unavailing. For example, the *Noerr* Court stated that “where a restraint upon trade or monopolization is the result of valid government action, as opposed to private action, no violation of the [Sherman] Act can be made out,” 365 U.S. at 136, and *Allied Tube* itself quoted that language in dicta. See *Allied Tube*, 486 U.S. at 499. But is the restraint caused by private standard-setting “the result of a valid government action,” or is it the result of “private action”? In a formalistic sense it is a state action, but often only in that formalistic sense. In other words, the *Noerr* snippet is fatally uninformative because it provides no guidance as to when any particular conduct is “valid government action.” Indeed, I think harm flowing from SSO conduct is more properly attributed to private action, and, as the *Midcal* case law makes clear, where a state deputizes private conspirators, they can be liable in antitrust if the state does not engage in “active supervision.” In other words, where the defendant acts with a deputy star, as powerful SSOs do, the restraint of trade should be considered the defendant’s act and not that of the state.

As the *Allied Tube* Court noted, “[t]he dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious.” 486 U.S. at 501-02.

<sup>117</sup> In the vein of that optimistic realism, I submit that perhaps we law professors should borrow a page from our social scientist cousins and recognize when a question is properly a theoretical one and when it is really suitable only for empirical resolution.

would be cloaked in an immunity so strong that they could effectively do anything they like with it. Moreover, for many SSOs being subject to antitrust scrutiny may well have comparatively little impact on their conduct. Justices White and O'Connor, for example, dissented quite bitterly in *Allied Tube*, claiming that antitrust responsibility for SSO members would spell the end of private standard setting, and thereby frustrate the work of state legislatures,<sup>118</sup> but that case was decided more than fifteen years ago and SSO activity has only grown and intensified.<sup>119</sup>

I think, moreover, that this aversion to antitrust exposure for SSOs actually flows from a confusion between immunity and liability. Holding that it is not immune does not mean that the defendant will be liable in antitrust. It simply means that defendant will have to get the advice of antitrust lawyers before it does its standard setting, and that it may be called on to show that its conduct is not an unreasonable restraint of trade. A different way of saying this is that it is better to deal with any concern for chilling positive SSO conduct through wise application of the rule of reason, with aggressive application of summary dismissal, than to cloak private conspiracies in immunity.

A useful analogy can be drawn to organizations like the Consumers Union (which publishes the familiar *Consumer Reports*) or Underwriters Laboratories, which perform services similar to petitioning SSOs but would never enjoy an antitrust immunity because they do not petition government in the way that petitioning SSOs do.<sup>120</sup> At the same time, it is also virtually inconceivable that either of these organizations would be held liable in antitrust, because their conduct is simply so distant from "unreasonable restraint of trade." Absent a showing of bad intent (presumably including evidence of false statements) plus substantial evidence of causation and actual injury, such a finding seems impossible.<sup>121</sup>

One reason a group like Consumers Union or Underwriters Laboratories would probably never lose on an antitrust claim is that they have no for-profit business competitors within their membership. Arguably, then, my view might require that *all* SSOs remake themselves in the model of Underwriters Laboratories or Consumers

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<sup>118</sup> *Allied Tube*, 486 U.S. at 524-26 (White, J., dissenting).

<sup>119</sup> See *supra* note 14 and accompanying text.

<sup>120</sup> Assume for the sake of argument that such an organization would not have a defense based on unilateral conduct. Of course, the organization might rely on cases like *Schachar* and *Clamp-All*, but in my opinion those cases are questionable and not universally applied. See *supra* note 49.

<sup>121</sup> See *supra* notes 46-50 and accompanying text (discussing relevant case law). As a procedural matter, the burden will be on the plaintiff to show that a reasonable jury could find the conduct unreasonably in restraint of trade, and in the usual case, a plaintiff would be unable to adduce appropriate evidence.

Union. But, assuming that is true, it might not be so bad. If states delegate decision-making power to non-government groups as opposed to state regulatory agencies, perhaps they should first look at the membership of the organization they choose to deputize, and pick organizations that have taken steps to render themselves truly independent. It would not be unambiguously negative if they had no business members. Indeed, to the extent that businesses want to be involved, they could either fund genuinely independent SSOs or they could simply lobby for the adoption of independent codes that they happen to prefer. (Lobbying of that nature would unquestionably enjoy the petitioning immunity.) This proposal might well encourage some SSOs to expel their private business members, but that is not an unambiguous net loss. Indeed an exciting development is that, quite independently of anything related to antitrust, the federal government has begun to encourage precisely this, giving a strong, non-antitrust incentive to reorganize SSOs in an independent fashion, suggesting that my proposal may not rob state government of the supply of private standards.<sup>122</sup>

This proposal might also seem unfair to the extent that it puts the antitrust risk on private persons even though state governments are to blame for the real failure (namely, it is the states' fault for not meeting the "active supervision" prong of *Midcal*). The same problem, however, inheres in the normal *Midcal* case. It might seem unfair, for example, if defendants heed a state's call to fix prices according to a state program only to be held liable in antitrust because the state then failed "actively [to] supervis[e]" the defendants' conduct. That, however, is already the current state of affairs. In *FTC v. Ticor Title Ins. Co.*,<sup>123</sup> for example, private insurance companies were invited by several states to set up "interstate rate bureaus." These bureaus were simply naked price fixing devices that set the price at which insurers would sell title insurance. The question in the case was whether the states involved had exercised "active supervision" for *Midcal* purposes. Ultimately, the insurance companies lost their immunity solely because the state governments had not adequately done their jobs.<sup>124</sup>

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<sup>122</sup> Government agencies are now required by law to make use of private standards wherever they exist and are relevant either to a particular government procurement or regulatory program. See *supra* notes 16, 52. What is especially interesting, however, is that the agencies are only so required where the standard in question is adopted in a fair and independent manner, according to a procedure that provides "due process." See *id.* That a huge client (the federal government) will be required to utilize a given SSOs standard so long as the SSO itself complies with these structural requirements should be a powerful incentive for biased or abusive SSOs to restructure. See *supra* note 52.

<sup>123</sup> 504 U.S. 621, 628-29 (1992).

<sup>124</sup> See *id.* at 639-40. Namely, in order to provide "active supervision," the states had done no more than retain a right to veto the prices set by the rate bureaus, and they never exercised the right. See *id.*

Frankly, that state of affairs seems acceptable. It seems appropriate that before business groups engage in activity that is potentially harmful to competition, they get the advice of an antitrust lawyer, and that they themselves bear some of the risk rather than cloaking themselves in immunity and asking society to bear the entire risk of their conduct.<sup>125</sup>

Finally, if the value that SSOs provide to state governments is the information they provide, they could simply provide information rather than actually legislate. Business people are free to provide testimony to legislatures and agencies, and they are equally free to prepare informational materials. One possible reason they go further and join SSOs that restrain trade is because they *want* to. The ability to set government policy is more valuable than the ability, shared by everyone, simply to talk to government.

A related counter-argument, also driven by liberal instincts, is that the proposed line between those SSOs that “are effectively *Midcal* defendants” and those that aren’t is too difficult or is imaginary. This point often invites the strongest concern of any in this Article because it seems to jeopardize conduct similar to traditional lobbying. Thus, to many it appears that there is no obvious difference on my definition between the conduct of a deputized SSO and some things that evidently should not be open to antitrust. For example, it has been suggested to me informally that when Congress desires to amend the Copyright Act, relevant staffers convene meetings of representatives of the affected industries, who among themselves essentially draft the complex legislation that will be adopted via rubber-stamp by indifferent legislators. More generally, much legislation—perhaps most or nearly all legislation—is drafted in the first instance by lobbyists, and it may

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<sup>125</sup> Note in this connection that a statutory or regulatory solution to this problem would pose some advantages, since a statute or an FTC rule could make clear that only injunctive relief is appropriate to remedy harms flowing from anticompetitive SSO actions. Given the many arguments that SSOs do good in society and would be unduly chilled by the threat of treble damages, perhaps it would be best that the only remedy available for, say, ABA accreditation standards would be an injunction requiring that the offending standards be removed or changed. Indeed, the FTC is empowered only to seek prospective relief, *see* 15 U.S.C. § 45(b) (2004) (empowering FTC “cease and desist” orders); 2 AREEDA & HOVENKAMP, *supra* note 10, ¶ 302e, and therefore might be the ideal overseer of standard setting operations.

The problem is that very little can be expected to happen in Washington where SSOs are concerned. First, there is a congressional directive to deal with, by which a well-lobbied Congress has already told the FTC not to interfere in SSO conduct. *See supra* note 21 and accompanying text (discussing 15 U.S.C. § 57a(a)(1)(B)). Moreover, SSOs have lots of money to fund litigation and lobbying efforts, and it seems unlikely that any effective legislation or regulation would ever get off the ground. *See id.* (describing the FTC’s abortive regulatory attempt of the 1980s). In any case, legislation in the unsettled and poorly-understood area of antitrust immunity seems fraught with unpredictable perils. Therefore, the only feasible solution might be a case law revision making clear that the petitioning immunity does not protect SSOs when they are effectively *Midcal* defendants.



be that much of it undergoes little substantive scrutiny before being made law.

The response is that in those other cases, there exists no *relationship* between a private entity and the government, and the lack of relationship changes the situation. Consider again the ABA. The organization holds significant sway as to law school accreditation and other matters with most state governments, so much so that many of them have *prospectively* adopted *future* ABA decisions. This state of affairs has come about after *decades* of ABA agitation and cajoling of its government counterparts and it is one that appeals to both parties. Given the lack of state interference in ABA affairs, the situation seems obviously one of shared power—sharing of the *same* power.

Such a situation differs from either the copyright caucus or the one-time, one-shot lobbyist-drafted bill. The deputized SSO proceeds with autonomy, typically with no concern for the political tastes of its legislator clients (or their constituents), with very little scrutiny by press or public, usually with no concern for competition from rival policy entrepreneurs, and with *carte blanche* to fashion its membership and procedures as it chooses. Likewise, the deputized SSO is just more powerful—it has a hi-speed internet connection line to the state's official legal rules, whereas run of the mill lobbyists have at a best a slow, temperamental dial-up line that requires constant maintenance. Thus, the difference could be cast at least in part as a difference in productive efficiency. The SSO is a lower cost producer, a more efficient organizational entity for the production of public policy than is the lobbyist or the ad hoc coalition, which cannot simply make the law itself but must act through the complex, costly, and unpredictable agency of an elected legislature. Thus, the SSO enjoys an unparalleled opportunity to render its own will a legal fait accompli *before* the fact, with no real need to consider any interests except its own.

#### D. *The Residual First Amendment Problem*

The final question is whether antitrust scrutiny of SSO standard setting would itself violate the First Amendment.<sup>126</sup> In fact, it is surprising that the question has weighed so heavily on the courts, because the answer is that antitrust scrutiny in the case of commercial SSO activity is actually fairly unlikely to violate the First Amendment, at least under the law as it stands.

First, though there appears to be no law directly on point, antitrust

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<sup>126</sup> A private antitrust action itself constitutes the "state action" requisite to violations of the Constitution. *Cf.* *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

regulation of commercial standard setting is very likely content neutral regulation that is constitutional under the deferential standard of *United States v. O'Brien*.<sup>127</sup> (Remember in this connection that regardless of whether the SSO seeks government adoption, the First Amendment analysis is the same; there is no greater First Amendment protection for "petitioning" than there is for "speech."<sup>128</sup>) In two significant cases, the Supreme Court itself has made clear that antitrust regulation, when applied to commercial market actors for the purpose of protecting competition, is content neutral.<sup>129</sup> In both cases, the lynchpin of the Court's reasoning is the commercial character of antitrust regulation and the conduct to which it applies. First, in *NAACP v. Claiborne Hardware Co.*,<sup>130</sup> before holding that local business people could not sue members of the NAACP for boycotts to protest racism, the Court pointed out that "[t]he presence of protected activity . . . does not end the relevant constitutional inquiry. . . . *This Court has recognized the strong governmental interest in certain forms of economic regulation,*

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<sup>127</sup> 391 U.S. 367 (1968).

<sup>128</sup> The Court has made clear that the Petition Clause of the First Amendment does not protect "petitioning"—which on the modern definition means roughly "political speech," see *Sagers*, *supra* note 21, at 936-40—in a way different than the Speech Clause protects speech. See *McDonald v. Smith*, 472 U.S. 479, 482, 485 (1985) ("The right to petition is cut from the same cloth as the other guarantees of the [First] Amendment"; "To accept petitioner's claim of absolute immunity [for petitioning activity] would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble."); cf. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 911-12 (1982) ("The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.'") (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)); *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("[T]he rights to assemble peaceably and to petition . . . are intimately connected, both in origin and purpose, with the other First Amendment rights of free speech and free press."); cf. also 2 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 16:3 (rev. ed. 2000). Smolla observes,

[w]here rights of petition, assembly or association are specifically relied upon, the doctrines devised usually mimic precisely the doctrines familiar from free speech cases generally. Perhaps the best illustration is the [*McDonald*] Court's refusal to make statements contained in a petition to the government immune from liability for libel, effectively making the Petition Clause and the Speech Clause equivalent for purposes of determining First Amendment protection for libel.

See generally *Sagers*, *supra* note 21.

<sup>129</sup> *United States v. O'Brien*, 391 U.S. 367 (1968), provides that where a law is content neutral, it is consistent with the First Amendment if (1) it "furthers an important or substantial governmental interest," and (2) "the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377. *O'Brien* is normally said to have four elements; in addition to the three mentioned (content neutrality, substantial interest, and only essential incidental impact), the law must be "within the constitutional power of the Government." *Id.* That final vestigial requirement, however, is redundant. See SMOLLA, *supra* note 128, at § 9:4. It would be ludicrous to suggest that the goals of antitrust are not "important or substantial governmental interests." Moreover, it seems clear under the Court's case law that, at least when the regulation is aimed at commercial players acting in their own economic interest, enjoining the conduct and even imposing money damages are no greater "incidental restrictions" than is "essential."

<sup>130</sup> 458 U.S. 886 (1982).

even though such regulation may have an incidental effect on rights of speech and association.”<sup>131</sup>

Second, in *Federal Trade Commission v. Superior Court Trial Lawyers Association*<sup>132</sup> the Court picked up the question to which it alluded in *Claiborne Hardware*, and held that a boycott by attorneys who practiced as court-appointed criminal defenders could be attacked by the government in antitrust.<sup>133</sup> Therefore, where the conduct to be regulated is predominantly commercial and engaged in for the defendant’s own economic benefit, antitrust regulation of it is not barred by the First Amendment. This is true even when the commercial activity is partially political or “altruistic,”<sup>134</sup> so long as the participants in the restraint “stand to profit financially from a lessening of competition in the [affected] market.”<sup>135</sup>

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<sup>131</sup> *Id.* at 912 (emphasis added). The Court further explained that “[t]he right of business entities to ‘associate’ to suppress competition may be curtailed,” 458 U.S. at 912 (citing *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679 (1978) (upholding antitrust liability against a group that prohibited its members from advertising prices)). The *Claiborne Hardware* Court, then, took as its example of a content-neutral economic regulation permissible under *O’Brien*, an antitrust suit *against a standard setting organization*(!). In other words, the *Claiborne Hardware* Court did everything but hold that antitrust attack on commercial standard setting should be analyzed under *O’Brien*.

<sup>132</sup> 493 U.S. 411 (1990).

<sup>133</sup> Indeed, the Court not only held the conduct protected by neither the petitioning immunity nor the First Amendment, but per se illegal. The distinction has everything to do with the commercial character of the conduct. The Court pointed out that the boycotters in *Claiborne Hardware* “sought only the equal respect and equal treatment to which they were constitutionally entitled. . . . The same cannot be said of attorney’s fees.” *Id.* at 426. In *Superior Court Trial Lawyers Association*, “the immediate objective was to increase the price that [the defendants] would be paid for their services,” and therefore “[s]uch an economic boycott is well within the category that was expressly distinguished in the *Claiborne Hardware* opinion itself.” *Id.* at 427 (citing *Claiborne Hardware*, 458 U.S. at 914-15) (footnote omitted).

<sup>134</sup> *Id.* at 427.

<sup>135</sup> *Id.* Another important point is that in the simpler context of industry self-regulation—in which the SSO produces its standard only for industry use and there is no government involvement—there is no question that the SSO is open to antitrust scrutiny. See *supra* notes 49-50 and accompanying text. Moreover, false advertising and common law rules like trade libel seem similar to antitrust regulation of standard setting; though they involve “speech” by organizations, that speech can be regulated to prevent harm to consumers that arises from their misleading character. See *Peel v. Attorney Registration and Disciplinary Comm’n*, 496 U.S. 91, 99-100 (1990); 2 SMOLLA, *supra* note 128, at § 20:15.

The reason this is important is that standard setting by such entities seems clearly to be “speech” within the First Amendment, or at least as much “speech” as the conduct of petitioning SSOs is “petitioning.” This is critical because, again, there is no greater protection for “petitioning” than for “speech.” See *supra* note 128 and accompanying text. In other words, we can conclude from the fact that standards *not* proposed to government are constitutionally open to antitrust that standards that *are* so proposed may be outlawed as well, because merely making a case to the government does not render otherwise unprotected speech immune from legal challenge.

## CONCLUSION

In summary, the impact of the argument here is that in a particular class of cases, in which every court to have issued an opinion has said that the public-private distinction is of paramount significance, the traditional distinction can in fact be disregarded and the problem handled better than when the distinction is made to matter. Thus, if governments grant de facto power to SSOs such that in reality they hold sway in some aspect of policymaking significantly unlike that held by individuals, then those SSOs should be treated differently than individual human persons. In those cases, there should be no appeal to the petitioning immunity, but rather *Midcal* immunity should attach unless there is a failure of active government supervision. One solution, which discards the problematic inquiries of whether the defendant is “public” or “private” or whose particular action “caused” the harm, which incidentally are unrelated to the substantive purposes of both antitrust and the First Amendment, is to treat them the same as when they receive de jure delegations of government power. Determining whether an SSO is “effectively able to write state policy” may not be simple, but at least it has a determinable content not fraught with political and philosophical issues, and at least it bears some reasonable connection to the purpose of antitrust and the public interest.

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